STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

State of Minnesota,
Plaintiff,

Court File No.
05080147 & 05080151

v.

Moe Williams and
Daunte Rachard Culpepper,
Defendants.

ORDER REGARDING MOTION TO DISMISS FOR LACK OF PROBABLE CAUSE AND PROSECUTORIAL MISCONDUCT

The above-entitled matter came before the undersigned judge of district court on March 22, 2006, on the Defendant's Motion to Dismiss for Lack of Probable Cause.

Steve Tallen, Esq., appeared on behalf of the State. Joseph S. Friedberg, Esq. and Lisa Lodin Peralta, Esq., appeared on behalf of Defendant Moe Williams, who was also present. Earl P. Gray, Esq. and David Martin, Esq., appeared on behalf of Defendant Daunte R. Culpepper, who was also present.

IT IS HEREBY ORDERED:

1. The motion to Dismiss the charges against Daunte Rachard Culpepper for Lack of Probable Cause is **GRANTED**.

2. The motion to Dismiss the charges against Moe Williams for Lack of Probable Cause is **DENIED**.

3. The motion to dismiss the charge against Daunte Rachard Culpepper for prosecutorial misconduct is moot.

4. The motion to dismiss the charge against Moe Williams for prosecutorial misconduct is **DENIED**.

5. The trial for Mr. Williams will commence Tuesday, April 18th at 9:00 a.m. The remaining parties shall submit proposed jury questions for the juror questions to this Court no later than 4:30 p.m. on Thursday, April 13, 2006. Potential jurors will be called in on Monday, April 17, 2006 at 10:30 a.m. to complete juror questionnaires. The parties shall submit proposed jury instructions, other than those typically found in the Criminal Jury Instructions Guide, no later than 1:30 p.m. on Monday, April 17th.

6. The attached memorandum is hereby incorporated.

BY THE COURT:

Kevin S. Burke

Date: April 4, 2006

Kevin S. Burke
Judge of District Court

Memorandum

I. Probable Cause regarding the case against Mr. Culpepper

Many years ago a member of the United States Cabinet was accused, indicted and then tried by a jury for a criminal act. His prominence made his case the subject of significant media attention. The jury acquitted, but the ordeal left the defendant asking this rhetorical question, "Who will give me back my reputation?" It is for that reason, among others, that in those rare cases where a defendant aggressively attacks a complaint by the presentation of evidence subject to cross examination that a court may dismiss a case for lack of probable cause, upon a finding there is not substantial admissible evidence to warrant the case going forward. This is this Court's decision with respect to Defendant Daunte Culpepper.

A probable cause motion requires a judge to determine whether it is more probable that not that a crime was committed and that the defendant committed the crime. State v. Florence, 239 N.W.2d 892, 896 (Minn. 1976). Pursuant to Rule 11.03 of the Minnesota Rules of Criminal Procedure in felony and gross misdemeanor cases, a motion for insufficient probable cause may be brought and evidence offered in support or opposition of the motion. With respect to misdemeanors, which these defendants are charged with, Minnesota Rules of Criminal Procedure, Rule 12, governs pre-trial motions; this rule does not explicitly provide for a pre-trial challenge to probable cause. In this case, the Prosecution never objected to the Defendants presenting live testimony subject to cross examination as a part of the probable cause hearing.

The most common way of determining whether probable cause exists is to submit probable cause on the face of the complaint. Typically, a judge determines whether probable cause exists based only upon a reading of the complaint, without any additional information. At times, a defendant may challenge the meaning of a word or phrase in the complaint, or how the

complaint describes a particular part of the incident; in these situations, the prosecutor may supplement the complaint with police reports or transcribed witness statements. Initially, that is exactly what happened in this case with respect to the term, "lap dance." This Court read the police reports and determined that the complaint was therefore valid. While police reports and transcriptions of witness statements are hearsay and would not be allowed in as evidence at a trial, the reports and statements are permitted for a probable cause determination because they are "reliable hearsay", which is permissible at a probable cause hearing. See Minn. R. Crim. P. 18.06, subd. 1.

A rare type of probable cause hearing, referred to in Minnesota as a Florence hearing, occurs when the defendant or witnesses testify on the defendant's behalf and the testimony would exonerate the defendant. See Florence, 239 N.W.2d at 892. While this type of probable cause hearing is infrequently requested, the Rules governing felonies and gross misdemeanors explicitly provide for the introduction of live testimony. There is no reason why a similar procedure should not be available for a person charged with a misdemeanor. At the Florence hearing, if the defense produces witnesses the judge must base his or her decision on "substantial evidence that would be admissible at trial" rather than simply "the entire record including reliable hearsay in the whole or in part." Id. at 899-900 (citing Minn. R. Crim P. 18.06, subd. 1).

The Minnesota Supreme Court in Florence did not describe every possible situation that may arise; it did however give examples of what the Court believed may commonly occur in regard to testimony at a probable cause hearing. One example given, which is relevant to this case, is when the defense brings a motion challenging probable cause, it will be granted unless the prosecution submits substantial evidence, admissible at trial, such that this evidence would justify denying a directed verdict of acquittal. Florence, 239 N.W.2d at 903. The testimony

required to grant this motion includes testimony by a defendant, subject to cross examination, and testimony of a witness who places the defendant elsewhere than the scene of the crime. Id. The Court also stated that the function of the District Court at the procedural stage "does not extend to an assessment of the relative credibility of conflicting testimony." Id.

Mr. Culpepper and Mr. Williams testified as well as Larry Tucker, an employee of Mr. Culpepper who was with him on the evening of October 6, 2005. Nothing prevented the prosecution from calling witnesses to rebut their testimony. The prosecution made a tactical decision to simply rest on the police reports.

Mr. Culpepper testified that he, along with Mr. Tucker and his cousin went to the boat party. The three boarded one of the boats and played a game of dice the entire evening at the far end of the boat. Mr. Culpepper further testified that he was the designated driver and might have had one drink. Mr. Culpepper testified that his focus during the boat trip was the dice game.

Mr. Tucker corroborated Mr. Culpepper's testimony, stating that he never left Mr. Culpepper during the boat trip, not even to go to the bathroom. Although both Mr. Culpepper and Mr. Tucker testified that women came over to the game and offered dances, there was no impeachment of their testimony that the women were sent away.

In 1975, when the Minnesota Criminal Rules Committee proposed new rules that abolished the preliminary hearing and mandated reciprocal discovery, there was significant controversy generated by the proposed change. In fact, the Minnesota Supreme Court rejected the initially proposed rule. While Florence and its progeny clearly do not allow a probable cause hearing to replace discovery, it was never intended that paper records could totally replace testimony and cross examination in every situation. If that were the case there would be no point in even allowing a defendant to testify or to call an exculpatory witness. If that were the case,

the prosecution in this instance presumably would have objected prior to the defendants' testimony since under no circumstances would it make any difference. There are of course limits to this kind of challenge to probable cause. For example, a probable cause hearing with testimony is not permitted to force a sexual assault victim to testify, because that obviously would be a situation where the defendant was attempting to misuse the process to obtain discovery or harass a victim rather than to legitimately challenge the prosecutor's case. See State v. Rud, 359 N.W.2d 573 (Minn. 1984). In those situations, the Rud Court stated:

> If, in such a situation, the complaint, the police reports, the statements of witnesses and the representations of the prosecutor, who is an officer of the court, convince the court that the prosecutor possesses substantial evidence that will be admissible at trial and that would justify denial of a motion for a directed verdict of acquittal, then the court should deny the motion to dismiss without requiring the prosecutor to call any witnesses.

Rud, 359 N.W.2d 573, 579 (Minn. 1984). This Court interprets Florence and the cases that follow it, including Rud, to mean that the prosecutor may rely solely on reliable hearsay after testimony by a defendant or witness that would exonerate the defendant, only if the testimony of the witness would amount to skirting discovery rules by the defense or when the defendants testimony, if believed, would not necessarily lead to exoneration. In factual situations where the defendant produces credible evidence, which if believed would exonerate the defendant then the law requires the prosecutor to supplement "the record with substantial evidence admissible at trial and not inherently incredible which would be adequate to withstand a motion for a directed verdict of acquittal." Florence, 239 N.W.2d at 899-900. How much evidence is necessary is case specific. It is even plausible that a sworn affidavit in some

circumstances might suffice, but to only submit police reports that are not even sworn is simply not permissible[1].

The District Court's role at the probable cause stage is to determine whether probable cause exists and not to judge the credibility of the witnesses. In this case, the evidence presented for this court to consider is solely the testimony of the Defendants and the witness, Mr. Tucker. The prosecutor has offered nothing to rebut that testimony.

The testimony of Mr. Culpepper and Mr. Tucker, if believed, would exonerate Mr. Culpepper of the charges. In effect Mr. Culpeper and Mr. Tucker testified that he had an alibi which is a complete and unequivocal defense to the charges against him. Mr. Culpepper testified that he was completely sober and played a game of dice the entire evening. He stated that any woman who approached was asked to leave and not disturb the game. The decision in this case to dismiss the case against Mr. Culpepper is not based upon a technicality. Although there are decisions of a court that are premised upon discretion, this is not a decision based upon the court's exercise of its discretion. Since no evidence was presented to refute this testimony, this Court is compelled to find that it is not more probable than not that a crime was committed by Mr. Culpepper. As a result, the motion to dismiss the charges against Mr. Culpepper for lack of probable cause is granted.

II. Probable Cause regarding the case against Mr. Williams

Mr. Williams testified he had several drinks on the bus trip to the boat party and then continued to drink on the boat. Mr. Williams testified that he was in the hallway of the lower

[1] A police report is not admissible evidence in considering a motion for summary judgment, because unlike an affidavit, it is not sworn, even in a civil case with a lower standard of proof. See Kay v. Fairview Riverside Hospital, 531 N.W.2d 517 (Minn. Ct. App. 1995).

level of the boat waiting to go to the bathroom, when a woman dressed in lingerie exited the bathroom and asked Mr. Williams if he wanted to dance. They danced for a minute or two. Contrary to the complaint, Mr. Williams testified that he never touched her because he had a drink in one hand and a bag with his wallet, cell phone and a large amount of one dollar bills in his other hand. Mr. Williams testified that he did recall someone from the staff coming down the stairs while the dance occurred, but said that nothing offensive occurred.

In Mr. Williams' case, his testimony might, but would not necessarily, exonerate him of the charges. The consensual touching of the dancer's breast is not the gravamen of the charges filed against him. Obviously, the dancer was not offended, nor did she find the conduct lewd and lascivious. In fact it does not appear to this court that the dancer is necessarily even going to testify. The State's theory of the case presumably is that this dance was lewd and lascivious (count 1) and disturbed the peace of the witness (count 2). Since, unlike the testimony of Mr. Culpepper and his witness, Mr. Tucker, Mr. Williams' testimony would not necessarily exonerate him of the charges, the case against him cannot be dismissed.

III. Prosecutorial Misconduct regarding the case against Mr. Culpepper

Since this Court did not find there was probable cause to proceed with Mr. Culpepper's case, this Court does not need to reach this issue regarding Mr. Culpepper. This issue is moot.

IV. Prosecutorial Misconduct regarding the case against Mr. Williams

There is no issue that is potentially more crippling to public trust and confidence in the American justice system than racial bias in the courts. That proposition is one all of the parties and the court can agree upon. Although the Minnesota judiciary has initiated a variety of steps to

insure that there is no racial bias in our courts; the fact remains that our state has one of the highest incarceration rates per capita of African Americans in this country[2]. As important as the raw statistics of actual sentencing patterns are, appearances and perceptions count for a lot too. It is not an overstatement of the issue to state that the long term survival of our courts depends upon all persons having faith in the fairness of our process, particularly with respect to the fairness of courts toward minorities.

The Minnesota Supreme Court and Court of Appeals have in recent years taken a militant stance that holds that the trial judges of the state are extremely limited in regulating the charges filed by prosecutors as well as plea negotiations policies practiced by prosecutors. That line of cases leads to the inevitable conclusion that even though charges could have been filed against two Caucasian suspects, this Court is virtually precluded from challenging a prosecutor's discretionary authority to charge Mr. Williams. This Court does not believe that Steve Tallen is a racist. He is a decent and committed prosecutor. But he did, perhaps unwittingly, contribute to the creation of the perfect storm. It is understandable why Defendant Williams and perhaps others in the minority community sincerely believe that he is the victim of racial discrimination. Mr. Williams adamantly denies any wrongdoing and is undoubtedly perplexed as to why he is on trial and a Caucasian man who confessed to behavior arguably far more serious than he is alleged to have done is not charged. This case in the public's view is characterized as the "Vikings Boat Scandal," but this individual confessed that while acting as the captain of the boat he sucked on a woman's breast. There is evidence that the Caucasian Bar Manager paid for sexual favors.

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[2] In the last year for which statistics are available, the ratio of African Americans to Caucasians in Minnesota prisons was 25.09 to 1; the highest of any state. This data was reported by the Council on Crime and Justice in a report entitled *African American Males and the Criminal Justice System.*

There are three ways in which a prosecutor can improperly interject race into the criminal justice system. The first way is in the decision to charge or not to charge individuals in the same incident. The second opportunity is how the prosecution reaches plea negotiations with defendants in multiple defendant cases arising out of the same incident. The final type of discrimination occurs when comparing defendants' outcomes arising out of different yet similar incidents. This last scenario is not at issue here.

In State v. Krotzer, the defendant was charged with a crime that is commonly referred to as statutory rape. The defendant, who was 19 at the time, had a sexual relationship with his 14 year old girlfriend. See State v. Krotzer, 598 N.W.2d 252, 253 (Minn. 1996). The victim and her parents did not want the defendant prosecuted. In fact, the parents allowed a non-sexual relationship to continue between the victim and defendant. The charges were brought when an unnamed source reported the sexual relationship to the police. The defendant was charged and pleaded guilty. The District Court stayed adjudication of the sentence, meaning that the District Court did not convict the defendant, but rather placed him on probation for five years, and stated that if the defendant was successful on probation, the case would be dismissed at the end of the five years. Id. The prosecutor appealed the District Court's decision arguing among other things that the decision violated the Separation of Powers clause of the United States and Minnesota Constitutions. Id. at 254.

The Minnesota Court of Appeals rejected the prosecutor's argument stating, "prosecution can recommend a sentence, but it cannot force the court to impose a sentence from a list the prosecution wants." State v. Krotzer, 531 N.W.2d 862, 866 (Minn. Ct. App. 1995) (citing State v. Olson, 325 N.W.2d 13, 18 (Minn. 1982)). The Minnesota Supreme Court affirmed the Court of Appeals stating, "Under established separation of powers rules, absent evidence of selective or

discriminatory prosecutorial intent, or an abuse of prosecutorial discretion, the judiciary is powerless to interfere with the prosecutor's charging authority." Krotzer, 598 N.W.2d at 254, (citing Oyler v. Boles, 369 U.S. 448, 456 82 S.Ct. 501, 505-06, 7 L.Ed.2d 446 (1962)); see also Bordenkircher v. Hayes, 434 U.S.357, 364, 98 S.Ct. 663, 668-69, 54L.Ed.2d 604 (1978)).

When it comes to jurors subject to the appearance of racial discrimination, Minnesota courts are very aggressive in taking action that will insure that there is not legitimate appearance of racial discrimination. See State v. Angus, 695 N.W.2d 109, 116 (Minn. 2005); State v. DeVerney, 592 N.W.2d 837, 843 (Minn. 1999). However, after Krotzer, there are almost no instances when a trial judge has been upheld after attempting to stay adjudication of sentence or dismiss a case, based upon prosecutorial abuse of discretion. See State v. Lee, 706 N.W.2d 941 (Minn. 2000); State v. Wright, 699N.W.2d 782 (Minn. Ct. App. 2005); State v. Colby, 657 N.W.2d 897 (Minn. Ct. App 2003); State v. Angotti, 633 N.W.2d 554 (Minn. Ct. App 2001); State v. Ohrt, 619 N.W.2d 790 (Minn. Ct. App. 2000); State v. Leming, 617 N.W.2d 587 (Minn. Ct. App. 2000); State v. Scaife, 608 N.W.2d 163 (Minn. Ct. App. 2000); State v. Prabhudail, 602 N.W.2d 413 (Minn. Ct. App. 1999); *but see* State v. Pearson, 637 N.W.2d 845 (Minn. 2002). Following City of Minneapolis v. Buchette, 240 N.W.2d 500 (Minn. 1976) and State v. Hyland, 431 N.W.2d 868 (Minn. Ct. App. 1988), this most recent line of cases establishes a rule of law that requires that Mr. Williams establish that the prosecution intended to discriminate against Mr. Williams or acted in bad faith. While intent can be established through circumstantial evidence, the deference our courts have given to the separation of powers doctrine suggests, absent a confession by the prosecutor, no court can properly grant a motion like that brought by Mr. Williams.

The second way that a prosecutor could interject race is in how plea negotiations are offered. In State v. Anyanwu, the Court of Appeals held that the judge improperly added herself into a plea negotiation by becoming a direct participant in the plea negotiations. See 681 N.W.2d 411, 415 (Minn. Ct. App. 2004). In this case, Mr. Williams asks the Court not to simply stay adjudication after trial or to attempt through sentencing to right the wrong that he feels was done, but to outright dismiss the case. The position of the Court of Appeals that based upon the separation of powers doctrine judges must be passive in the role that a trial judge assumes in the adversary process leaves trial judges relatively powerless to address the issue raised by Mr. Williams. For example in a very recent case, although neither party even raised the issue of trial court involvement in the adversary process, the Court of Appeals on its own, presumably as a warning to trial judges, held that the wall of separation of powers in this state is terribly high. State v. Mays, 2006 WL 696250, *1 (Minn. Ct. App. March 21, 2006).

Analogies are frequently dangerous ways to explain legal analysis. Having acknowledged that, if this were an employment case and a business with six employees, suspected of wrong doing, fired the four African American employees while keeping two Caucasians, who confessed to wrong doing, the employer would in all likelihood lose the case. See generally Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed2d 597 (1976). The decision reached by this court is not one that may instill confidence in the system. Mr. Williams' sense of injustice has not been adequately answered by the legal conclusion this court is dictated to follow. Although this court is convinced that Mr. Tallen is not a racist and that perhaps unwittingly created the perfect storm, it is also true that the state of the law in Minnesota contributed to the storm by not having a rule of law far more committed to analyzing issues like this one from the prespective of how it looks, e.g. the appearance of impropriety, rather than

simply based on a standard that it is Mr. Williams' burden to establish by a preponderance that the prosecution intentionally discriminated against him. There is a great deal of concern in this state regarding the injection of partisan politics into the judiciary. That concern is borne not of a fear that judges of this state will in fact become partisan hacks, but rather the appearance itself will jeopardize the public's trust and confidence. Given the critical importance of the need for the criminal justice system to appear to be fair to minorities in the charging process, a case could be made to establish a different rule of law in this state. Just as judges' conduct is governed by an appearance of propriety standard, perhaps there should be a rule of law that would require prosecutors to analyze their charging decisions based on an appearance of propriety standard. Adopting a different rule of law however, is not the province of this court.